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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 DEREK A. HOYTE,

10 Plaintiff,

11 v.

12 RECONTRUST COMPANY N.A., a
13 National Banking Association; and
14 WELLS FARGO BANK, N.A., a
National Banking Association,

15 Defendants.

CASE NO. C11-5389BHS

ORDER GRANTING
DEFENDANTS' MOTION TO
DISMISS

16 This matter comes before the Court on Recontrust Company N.A.'s and Wells
17 Fargo Bank, N.A.'s ("Defendants") motion to dismiss (Dkt. 9). The Court has reviewed
18 the briefs filed in support of the motion and the remainder of the file and hereby grants
19 the motion for the reasons stated herein.

20 **I. PROCEDURAL HISTORY**

21 On April 21, 2011, Plaintiff Derek A. Hoyte ("Hoyte") filed a complaint against
22 Defendants in the Superior Court of the State of Washington in Clark County requesting
23 declaratory relief, injunctive relief, and an accounting. Dkt. 2, Declaration of Jacob M.
24 Downs, Exh. E ("Complaint"). On May 20, 2011, Defendants removed the action to this
25 Court. Dkt. 1.
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1 On May 27, 2011, Defendants filed a motion to dismiss. Dkt. 9. Hoyte did not
2 respond. On May 24, 2011, Defendants replied. Dkt. 12.

3 II. FACTUAL BACKGROUND

4 Hoyte alleges that he entered into a loan transaction with Bank of America N.A.
5 for the real property located at 3618 SE 327th, Washougal, WA (“Property”). Complaint,
6 ¶¶ 1, 4. On March 4, 2010, the Deed of Trust was transferred to Defendant Wells Fargo
7 Bank, N.A. *Id.* ¶ 8. Hoyte alleges that the “Deed of Trust contains a statement that the
8 real property conveyed thereby is not used principally for agricultural purposes.” *Id.* ¶
9 13.

10 Hoyte also alleges that that statement is false because

11 [o]n the date that the Deed of Trust was executed the property contained an
12 apple orchard of over 100 trees, which annually produced a crop of apples
13 for commercial sale. The orchard still contains all of the original apple
14 trees, the fruit of which are harvested annually for commercial sale. The
15 only other commercial activity which takes place on the property consists of
agritourism, or “farm tours” which is dependent upon, and integral to, the
farming activity.

16 *Id.* Hoyte’s causes of action for declaratory and injunctive relief are based on an
17 exception to Washington’s nonjudicial foreclosure proceeding wherein real property that
18 is used to produce crops must be foreclosed judicially. *See* R.C.W. 61.24.030(2).

19 Defendants have submitted a document from a public matter involving the
20 Property and a Notice & Order (“N&O”) issued by Clark County. On September 1, 2009,
21 the county issued the N&O alleging that Hoyte was “violating [Clark County Code]
22 40.210.020 by operating a commercial amusement service and/or a private recreational
23 facility, zip line tours, on the Property without Conditional Use Permit (“CUP”)
24 approval.” Dkt. 10, Declaration of Jacob M. Downs, Exh D (“Final Order”), ¶ A2. Hoyte
25 appealed the N&O and, on November 10, 2010, a public hearing was held on the N&O.
26 *Id.* ¶ C1. At the hearing, Hoyte testified that “He harvests apples on the site He
27 previously sold apples from the site to the public, however in recent years he processed
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1 the apples for juice for personal consumption.” *Id.* ¶ C3(h). The hearing officer found
2 that “the only agricultural use on the Property is an apple orchard, the product of which is
3 used solely for personal consumption.” *Id.* ¶ D2.

4 **III. DISCUSSION**

5 As a threshold matter, “If a party fails to file papers in opposition to a motion, such
6 failure may be considered by the court as an admission that the motion has merit.” Local
7 Civil Rule 7(b)(2). In this case, Hoyte failed to file papers in opposition to Defendants’
8 motion to dismiss. Therefore, the Court will consider Hoyte’s failure as an admission that
9 Defendants’ motion has merit.

10 **A. Judicial Notice**

11 “In deciding whether to dismiss a claim under Fed. R. Civ. P. 12(b)(6), a court
12 may look beyond the plaintiff’s complaint to matters of public record.” *Shaw v. Hahn*, 56
13 F.3d 1128, 1129 n. 1 (9th Cir. 1995) (citing *Mack v. South Bay Beer Distribs., Inc.*, 798
14 F.2d 1279, 1282 (9th Cir. 1986)). A court shall take judicial notice of adjudicative facts if
15 requested by a party and supplied with the necessary information. Fed. R. Civ. P. 201(d).
16 “A judicially noticed fact must be one not subject to reasonable dispute in that it is . . .
17 capable of accurate and ready determination by resort to sources whose accuracy cannot
18 reasonably be questioned.” Fed. R. Civ. P. 201(b).

19 In this case, Defendants request that the Court take judicial notice of the Final
20 Order on the N&O regarding the Property. Dkt. 9 at 3. The Court finds that the Final
21 Order is a matter of public record and that its authenticity is not subject to reasonable
22 dispute. Therefore, the Court will take judicial notice of the Final Order.

23 **B. Motion to Dismiss**

24 Fed. R. Civ. P. 12(b)(6) motions to dismiss may be based on either the lack of a
25 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal
26 theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990).
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1 Material allegations are taken as admitted and the complaint is construed in the plaintiff's
2 favor. *Keniston v. Roberts*, 717 F.2d 1295 (9th Cir. 1983). "While a complaint attacked
3 by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a
4 plaintiff's obligation to provide the grounds of his entitlement to relief requires more than
5 labels and conclusions, and a formulaic recitation of the elements of a cause of action will
6 not do." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (internal
7 citations omitted). "Factual allegations must be enough to raise a right to relief above the
8 speculative level, on the assumption that all the allegations in the complaint are true (even
9 if doubtful in fact)." *Id.* at 1965. Plaintiffs must allege "enough facts to state a claim to
10 relief that is plausible on its face." *Id.* at 1974.

11 The Washington Deed of Trust Act ("DOTA") provides the framework for
12 nonjudicial foreclosure proceedings in Washington. R.C.W. 61.24, *et seq.* A nonjudicial
13 trustee's sale can only be conducted where
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15 the deed of trust contains a statement that the real property conveyed is not
16 used principally for agricultural purposes; provided, if the statement is false
17 on the date the deed of trust was granted or amended to include that
18 statement, and false on the date of the trustee's sale, then the deed of trust
must be foreclosed judicially. Real property is used for agricultural
purposes if it is used in an operation that produces crops, livestock, or
aquatic goods

19 RCW 61.24.030(2).

20 In this case, Defendants argue that Hoyte is not entitled to declaratory or injunctive
21 relief based on his allegation that the Property "contains all of the original apple trees, the
22 fruit of which are harvested annually for commercial sale." Defendants contend that (1)
23 Hoyte does not allege that the Property was or is used "principally" to produce apple
24 crops and (2) Hoyte's recent public testimony is that he currently "processed the apples
25 for juice for personal consumption." Final Order, ¶ C3(h). The Court agrees with
26 Defendants and finds that the Complaint fails to allege facts sufficient to show that the
27 Property is used principally to produce apple crops. Even if the Property is used to
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1 produce some apples that are sold commercially, a fact that is in direct contradiction to
2 Hoyte's recent public testimony, Hoyte has failed to allege that this production of apples
3 is the "principal" use of the Property. Therefore, the Court grants Defendants' motion on
4 these issues because the Complaint does not contain sufficient allegations to entitle Hoyte
5 to declaratory or injunctive relief.

6 With regard to Hoyte's request for an accounting, Defendants argue that Hoyte has
7 failed to include allegations entitling him to relief. To state a cause of action for an
8 accounting, a plaintiff must establish: "(1) a fiduciary relation existed between the parties,
9 or that the account is so complicated that it cannot be conveniently taken in an action at
10 law; and (2) the plaintiff has demanded an accounting from the defendant and the
11 defendant has refused to render it." *State v. Taylor*, 58 Wn.2d 252, 262 (1961).

12 Upon review of the Complaint, Hoyte has failed to allege (1) that a fiduciary
13 relationship exists, (2) that a complicated account exists, or (3) that he has requested an
14 accounting that has been refused by Defendants. Therefore, the Court grants Defendants'
15 motion on this cause of action.

17 **C. Relief**

18 Defendants request that the Court dismiss the Complaint with prejudice. Dkt. 9 at
19 2. However, if the Court dismisses a complaint for failure to state a claim, "leave to
20 amend should be granted unless the court determines that the allegation of other facts
21 consistent with the challenged pleading could not possibly cure the deficiency."
22 *Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th Cir.
23 1986) (citing *Bonanno v. Thomas*, 309 F.2d 320, 322 (9th Cir. 1962)).


24 In this case, Hoyte has failed to respond to Defendants' motion to dismiss or offer
25 any arguments regarding how the deficiencies in the Complaint may be cured. Therefore,
26 the Court grants Defendants' requested relief and dismisses the Complaint with prejudice
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1 because the Court cannot determine that allegations of other facts will cure the
2 deficiencies in the Complaint set forth above.

3 **IV. ORDER**

4 Therefore, it is hereby **ORDERED** that Defendants' motion to dismiss (Dkt. 9) is
5 **GRANTED** and Hoyte's Complaint is **DISMISSED with prejudice**.

6 DATED this 7th day of July, 2011.

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9 BENJAMIN H. SETTLE
10 United States District Judge
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